No. 20380

United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, EVA SMITH, HARRY SMITH, LILLIAN G. FISHER, BARBARA McGALLIAND, DORIS ROGERS, GAIL R. GREGG, RICHARD L. WALTON, heir of SUE M. WALTON, and DONALD WOOD,

Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Appellee.

APPELLANTS' BRIEF

Interlocutory Appeal from Order Denying Motion to Dissolve Restraining Order of the United States District Fourt for the District of Oregon

HONORABLE WILLIAMS G. EAST, Judge

GREEN, RICHARDSON & GRISWOLD,
JAMES B. GRISWOLD,
1003 Corbett Building, Portland, Oregon,
Attorneys for Appellants.

NELS PETERSON,
NICK CHAIVOE,
1000 S. W. Third Avenue, Portland, Oregon,
Attorneys for Appellant Donald Wood.

WILLIAM, SKOPIL, AND MILLER,
OTTO SKOPIL,
Fourth Floor—Pioneer Trust Building, Salem, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 10-65

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STATEMENT OF JURISDICTION

This action in the nature of interpleader was filed by Appellee on January 22, 1965, in the United States District Court, for the District of Oregon January 22, 1965, Appellee filed its Motion for an Order to Show Cause why a temporary restraining order enjoining all named defendants from instituting or prosecuting any proceeding in any federal or state court against the plaintiff and defendant Ellis D. Clark, should not be entered.

On January 22, 1965, the Court entered its Order directing and requiring each of the defendants to appear and show cause in writing why such temporary restraining order should not be granted. On or about the 11th day of February, 1965, defendant Theron Nauta filed Motion to Dismiss plaintiff's complaint. On February 12, 1965, defendant Greyhound Lines, Inc., filed its Motion and Objections to Issuance of Temporary Restraining Order and the marshal's return of service on Canadian defendants was filed. On the 23rd day of February, 1965, the defendant Mary Chishefski and defendant Edward Hollenbeck filed their motions and objections to the issuance of the temporary restraining order. On the 25th day of March, 1965, defendant Greyhound Lines, Inc. filed a Motion for an Order to Show Cause why plaintiff and co-defendants should not be enjoined from instituting or further prosecuting any action against it or its employee, Theron Nauta, and pursuant to said Motion, such order to show cause was entered on the 25th day of March, 1965. On the 26th day of April, 1965, motions of defendants Mary Chishefski and Edward Hollenbeck to set aside the order to show cause and to dismiss the complaint of State Farm Fire and Casualty Company were denied. On the 25th day of March, 1965, defendant Greyhound Lines, Inc. filed its Answer and Cross-Claim for Declaratory Relief and Demand for Trial by Jury. On the 3rd day of May, 1965, a temporary restraining order enjoining all defendants except defendant Gladys Hart from instituting or prosecuting any proceedings in any state or federal court against the plaintiff or any defendant who might con-

stitute a plaintiff's assured was entered. Thereafter, on the 17th day of May, 1965, Motion to Dismiss or in the alternative for Change of Venue and to dissolve the restraining order was filed by defendants Kathryn Tashire, Eva Smith, Harry Smith, Lillian G. Fisher, Barbara McGalliand, Doris Rogers, Gail R. Gregg, and Richard L. Walton, heir of Sue M. Walton. On the 21st day of May, 1965, a Motion in Limine to Quash and Dismiss and for an Order Dissolving any Temporary Restraining Order or in the Alternative for Change of Venue was filed by defendant Donald Wood. June 1, 1965, the District Court entered its Order denying appellant's motion for an order dissolving the restraining order, denying the motions to dismiss, extending the time within which to hear the motion for change of venue and holding that the service upon defendant Donald Wood by substituted service was defective but granting plaintiff time in which to perfect service upon defendant Donald Wood. Appellants Kathryn Tashire, Eva Smith, Harry Smith, Lillian G. Fisher, Barbara McGalliand, Doris Rogers, Gail R. Gregg, and Richard L. Walton, heir of Sue M. Walton, on the 30th day of June, 1965, filed a Notice of Appeal pursuant to provisions of 28 USCA § 1292, (a)(1). On June 30, 1965, appellant Donald Wood filed his Notice of Appeal pursuant to 28 USCA § 1292 (a)(1), all within the time allowed by Rule 73(a), Federal Rules of Civil Procedure. Consequently, this Court has jurisdiction to review said Order Denying Motion to Dissolve Restraining Order under the provisions of 28 USCA § 1292 (a)(1).

STATEMENT OF THE CASE

A. Summary of Facts

Appellee has filed an action in the nature of interpleader, naming as defendants numerous paying passengers on a Greyhound Lines, Inc. bus involved in an accident which happened in the State of California. Appellee is the insurance carrier for the driver of the vehicle which was involved in the collision with the said Greyhound Lines bus. The vehicle driven by appellee's insured was owned by another person, who had no insurance. All of the passengers on the bus incurred personal injuries in some degree. These passengers, according to paragraphs IV, V, VI, VII and VIII of appellees' complaint are residents of various of the states of the United States and the provinces of Canada. Among other things, appellee requests an injunction be entered restraining defendants from prosecuting pending suits against the plaintiff or plaintiff's insured or from instituting like proceedings in any federal or state court. All of the defendants residing in the United States were personally served with the exception of appellant, Donald Wood. No personal service was had upon the defendants who are residents in Canada. Substituted service was had upon appellant Donald Wood by serving his wife, Linda Wood, in Berkeley, California. However, the return of service by the United States Marshal did not show that appellant Wood was not in the state of California and could not be served there. On May 3, 1965, plaintiff caused a temporary restraining order to be entered by this Court, whereby all appellants were restrained and enjoined from instituting or prosecuting any proceeding

against the plaintiff or its assured in any federal or state court.

Appellants Tashire, Eva Smith, Harry Smith, Fisher, McGalliand, Rogers, Gregg and Walton moved to dismiss plaintiff's action in the nature of interpleader and for an Order Dissolving the Temporary Restraining Order on jurisdictional grounds. The basis of said motion was that the defendants residing in Canada could not be properly served; that the said Canadian residents were claimants to the fund, attempted to be brought into court by the appellee, and were indispensable parties and that before interpleader would lie, all indispensable parties were required to be within the jurisdiction of the Court. Appellant Wood also filed a motion in limine to quash service and dismiss and to dissolve the restraining order on the same grounds and for the further reason that he had not been properly served and was not properly before the Court, and therefore, the interpleader must fail for lack of jurisdiction.

It should be noted that the District Court gave appellee additional time in which to properly serve defendant Wood; that as of September 21, 1965, a return was made by the United States Marshal and filed October 5, 1965, showing that defendant Wood was not served; that there is no showing that he is not within the State of California, and not available for service.

B. Question Presented:

The foregoing facts, the points and authorities filed in support of and in opposition to appellants' motion and the argument before the Court present the follow-

ing question. Does the United States District Court for the District of Oregon have jurisdiction of the person of residents of Canada who have been served by registered mail, so as to render the restraining order effective and is therefore not required to dissolve its order enjoining defendants-appellants from instituting or prosecuting proceedings against appellee or its assured and Greyhound Lines, Inc. and its employee, Theron Nauta?

SPECIFICATION OF ERRORS

The Court Committed error when it concluded:

1. That interpleader is a proceeding in rem and not in personam.

2. That service by registered mail, pursuant to Rule 4(1) of the Federal Rules of Civil Procedure, was valid service in this case.

3. That there is proper jurisdiction over all defendants and therefore denied appellants' motion to dissolve the restraining order enjoining defendants-appellants from prosecuting a cause of action against plaintiff's assured, and Greyhound Lines, Inc. and its employee.

SUMMARY OF ARGUMENT

The District Court committed an error of law when it concluded that there was proper jurisdiction over this cause and appellants herein and when it concluded that the motion to dissolve the restraining order of May 3, 1965, and the motion to dismiss were not well taken.

A. An action in the nature of interpleader is a proceeding in personam.

B. Personal service on all prospective claimants under 28 USCA 2361, is a prerequisite to jurisdiction in a proceeding under 28 USCA, 1335.

1. All possible adverse claimants to a fund require proper service before the Court has jurisdiction to adjudicate an action in the nature of interpleader.

2. Where there are two statutes concerning the same subject, one general and one specific, the specific statute controls.

ARGUMENT

The District Court committed an error of law when it concluded that it had jurisdiction of the action in nature of interpleader and that the motion of the appellants for an order dissolving the restraining order of May 3, 1965, and to dismiss were not well taken.

A. Interpleader is an in personam proceeding and is an equitable remedy and is controlled by equitable principles. *Jett Drilling Co.* v. *Tibbetts,* 230 F. Supp. 58, (1964); *Pan American Fire and Casualty Co.* v. *Revere,* 188 F. Supp. 474, (1950); *Aetna Life Insurance Co.* v. *Du Roure,* 123 F. Supp. 736; *Clement Martin* v. *Dick Corporation,* 27 F. Supp. 961.

The District Court during argument impliedly held (T 15-18, 20-23, T 25, 20-23, 24-25, T 26, 1-12) because a res was surrendered to the Court, the proceeding was necessarily in rem, and the injunctive proceedings were

merely for the protection of the res. The mere fact that a person against whom an in personam liability is asserted deposited money into Court, does not thereby transform that liability into a res and thereby enable the Court to proceed to adjudication by in rem or quasi in rem process of the defendants' in personam claims. *Aetna Life Insurance Company* v. *Du Roure,* 123 F. Supp. 136.

Appellee argued that the alleged deposit of a fund created a res and that this cause was therefore an action in rem and accordingly any form of notice to the claimants to the said fund to come in and make their claims was sufficient. Furthermore, since this then was an in rem proceeding, and defendants living in foreign countries would have to come to the United States to make their claims, they could therefore, be forced to come in and make their claims or be forever foreclosed. Under the foregoing theory the position of appellee can be upheld only if the within cause is a proceeding in rem. Since interpleader is an in personam proceeding and not in rem, appellees position is not tenable.

B. Personal service on all prospective claimants under 28 USCA 2361 is a prerequisite to jurisdiction, in a proceeding under 28 USCA 1335.

All possible adverse claimants to a fund require proper service before the court has jurisdiction to adjudicate an action in the nature of interpleader.

1. In this case, appellee is seeking injunctive relief through a restraining order, and, since an injunction is being sought, personal service of all defendants must be

obtained. *Clement & Martin* v. *Dick Corporation,* 97 F. Supp 961; *Republic of China* v. *American Express,* 108 F. Supp, 169, 170.

In the latter case in the District Court for the Southern District of New York, it was held that before a trial could be had, in connection with interpleader proceedings, it was necessary that all possible adverse claimants required personal service before the Court would have jurisdiction of the cause. Unless service can be made upon all defendants in this cause, this Court is without jurisdiction as to those not served and cannot render any judgment with respect to the funds deposited with the Court by the appellee which would be binding upon those not properly served. Since those not served are indispensable parties, no final adjudication as to the rights of all the claimants can be had. The appellants who are residents of Canada are indispensable parties. *Metropolitan Life Insurance Company* v. *Dumson,* 194 F. Supp. 9 (1961); S. D. New York. In that case, the Court stated at page 11:

> "(1, 2) Interpleader is an action in personam which brings about a 'final and conclusive adjudication of * * * personal rights' and required that a claimant to the fund be brought before the court in order for a judgment to be binding upon him. *New York Life Insurance Co.* v. *Dunlevy,* 241 US 518, 521, 36 S. Ct. 613, 60 L. Ed. 1140. See also *Pennoyer* v. *Neff,* 95 US 714, 24 L. Ed. 565. Since plaintiff has failed to perfect service on Baruch Lewittes, this Court is without jurisdiction as to him and cannot render any judgment in respect to the fund deposited with the Court which would be binding

upon him. Baruch Lewittes is an indispensable party to this action as conflicting claims to the fund on deposit cannot be resolved without him. The failure of plaintiff to bring him before the Court requires dismissal of the Complaint. Rule 12 (b)(7), FRCP; see also Rule 19, 3 Moores Federal Practice, p. 2101 et seq. (2 Ed, 1948).

2. Where there are two statutes concerning the same subject, one general and one specific, the specific statute controls.

28 USCA 2361 provides:

"In any civil action of interpleader or in the nature of interpleader, under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any state or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States Marshals for the respective districts where the claimants reside or may be found."

In the case at bar, reliance is based upon the interpleader sections to support jurisdiction in this Court. The statute cited above provides that all process shall be served by the United States Marshal in the districts where claimants reside or may be found. Under this statute, there is no method by which appellee may validly serve defendants not residents of the United States.

This is a specific statute providing for service of process in an action of interpleader.

Appellee in argument contends that Rule 4(i) of the FRCP as amended, effective July 1, 1963, authorizes service by mail upon defendants residing outside of the continental United States. It is axiomatic that where a specific statute controls the same subject matter covered in a general statute, the specific statute controls without regard to priority of enactment. *Bulova Watch Co.* v. *United States,* 6 L. Ed.2d 72, 76; *McEvoy* v. *United States,* 88 L. Ed. 1163, 1167.

The general statute does not repeal the specific statute unless such repeal is expressly set forth. Repeal is never implied. *C. I. R.* v. *Riviera's Estate,* 214 F.2d 60; *United States* v. *Hawkins,* 228 F.2d 517; *Stewart* v. *United States,* 116 F.2d 405.

Congress is presumed to know the contents of its statutes and if it intends the general statute to amend the specific statute it would so state.

Anderson v. *Gladden,* 188 F. Supp. 666 (Or.) Affmd. 293 F.2d 463, (Ninth Circuit) cert. denied.

Sub Section (e) of Rule 4 FRCP states as follows:

> "Whenever a statute of the United States or an order of Court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the District Court is held, service may be made under the circumstances and in the manner prescribed by the statute or court, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule, * * *."

28 USCA 2361 provides for a method of service as set forth above in Rule 4 (e) and is therefore controlling.

It is further submitted that subsection (i) Rule 4, FRCP is not applicable here. Appellee has contended in argument that 4 (i) created additional methods of service. This is erroneous. It seems clear that the intent of the amendments which were effective July 1, 1963, was to extend methods of service in Federal Court so as to be harmonious with those provided in state proceedings. No new methods for service of process were created. See notes of Advisory Committee on Rules, page 27, 1964 Cumulative Annual Pocket Parts 28 USCA Rules 1-11. The language referred to is as follows:

> "Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of the Court of a state, it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient.

The case of *United States* v. *Montreal Trust Company,* 35 FRD 216 (1964) supports this position. The language, as it appears at page 219, is as follows:

> "It is clear, therefore, that by virtue of a federal rule having the force of federal statute, service of a summons in an action in the federal court in New York may be made, whenever a New York statute so provides, upon a defendant who is not an inhabitant of New York or found within that state. Does the rule mean that although the service may be

made outside New York, it must nevertheless be made within the United States? The rule does not say so.

"And Rule 4(i) is a clear indication that Rule 4(e) is not so restricted. Rule 4(i) relates to the manner of service to be followed in making service in a foreign country. It begins '(w)hen the federal or state law referred to in subdivision (e) of this rule (i.e., Rule 4(e)), authorizes service upon a party not an inhabitant of or found within the state in which the District Court is held, and service is to be effected upon the party in a foreign country,' service may be made in the fashion prescribed by the rule. This recognizes that Rule 4(e) contemplates that service pursuant to state law may be made in a foreign country. Service under the Illinois "long-arm" statute, which is similar to New York's (Ill. Rev. Stat. Ch. 110, §§ 16, 17), effected upon a defendant in Germany, has been upheld in an action in the Federal District Court for the Northern District of Illinois. *Magnaflux Corporation* v. *Foerster,* 223 F. Supp. 552 (D. C. ND. Ill. 1963)."

Foreign service was authorized in this decision inasmuch as the state statute provided for such service, and the cause arose in that state.

CONCLUSION

For the reasons set forth hereinabove the order denying appellants' motion to dissolve the restraining order should be reversed and the cause remanded with directions to grant appellants' motion to dissolve the restraining order and to dismiss for lack of jurisdiction.

Respectfully submitted,

GREEN, RICHARDSON & GRISWOLD,
JAMES B. GRISWOLD,
Attorneys for Appellants.

NELS PETERSON,
NICK CHAIVOE,
Attorneys for Appellant
Donald Wood.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

JAMES B. GRISWOLD,
Of attorneys for Appellants